NO. 48321-1

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

AZARIAH ROSS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Elizabeth Martin

No. 12-1-03302-3

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
CHELSEY MILLER
Deputy Prosecuting Attorney
WSB # 42892

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

Table of Authorities

State Cases

Statutes

Rules and Regulations

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the trial court properly denied defendant's motion to suppress his statements to law enforcement when substantial evidence exists in the record to support its finding that defendant knowingly, voluntarily and intelligently waived his rights and agreed to speak with the officers?

2. Whether any error in the trial court's failure to enter written findings of fact and conclusions of law has been resolved when the State has taken action to remedy the error?

3. Whether the appropriate standard of review for a challenge to a charging document after the State rests but before the jury reaches a verdict is the liberal standard known as the two prong ***Kjorsvik*** test, and whether defendant is unable to meet either prong of that test and show that the information was factually insufficient and such a deficiency actually prejudiced him?

4. Whether defendant is unable to show prosecutorial misconduct occurred in the present case that had a substantial likelihood of affecting the jury's verdict?

5. Whether defendant is unable to show a double jeopardy violation as the legislature has authorized multiple punishments for the unlawful imprisonment and burglary convictions through the burglary anti-merger statute, and the merger doctrine does not apply to the crimes of unlawful imprisonment and first degree robbery?

6. Whether the trial court properly found that the first degree robbery and unlawful imprisonment convictions did not constitute the same criminal conduct when they were committed against different victims and without the same intent?

7. Whether this Court should disregard any issues relating to defendant's assignments of error 8 and 9 where he has failed to provide any argument in support of those issues in his brief?

B. STATEMENT OF THE CASE.

1. Procedure

On August 30, 2012, the Pierce County Prosecutor's Office charged AZARIAH ROSS, hereinafter "defendant" and four other co-defendants with numerous felonies relating to seven home invasion incidents that took place in Tacoma between January and August of 2012. CP 91-117. Ultimately, defendant was charged by second amended information and proceeded to trial on 52 counts. CP 294-317. The

charges included one count of conspiracy to commit robbery in the first degree and/or burglary in the first degree, seven counts of burglary in the first degree, 14 counts of robbery in the first degree, 18 counts of unlawful imprisonment, two counts of theft of a firearm, seven counts of trafficking in stolen property in the first degree, and three counts of assault in the second degree. CP 294-317. All but one of the charges (count 17, theft of a firearm) included firearm sentencing enhancements. CP 294-317.

On August 8, 2013, defendant filed a CrR 3.5 motion to suppress his statements. CP 164-66. After a hearing, the trial court ruled the defendant's statements were admissible. CP 205-222. His trial was severed from his co-defendants' and began on July 9, 2015. 12/18/14 RP[1] 3; 1RP 3. After the State had rested its case, the defendant filed a "motion to dismiss all counts except count 1 for failure of the second amended information to be constitutionally sufficient." CP 402-436; 18RP 2421-34. The court heard arguments by both parties and denied the motion. 18RP 2449-53. The defendant also moved to dismiss several counts for insufficient evidence which the court also denied. 18RP 2461-90.

[1] The report of proceedings in this case is contained in several volumes. Volumes one through 23 are paginated consecutively and will be referred to by the volume number followed by "RP", for example "1RP" or "2RP", to be followed by the page number. The volume containing the sentencing hearing will be referred to as "SRP" followed by the page number. The remaining volumes are identified by the date of the hearing and will be referred to by the date followed by "RP", for example "2/28/13 RP" or "8/19/13 RP", to be followed by the page number.

The jury found defendant guilty of four counts of trafficking in stolen property in the first degree (counts 11, 18, 33, 72), two counts of burglary in the first degree (counts 12, 34), three counts of robbery in the first degree (counts 13, 14, 35), six counts of unlawful imprisonment (counts 15, 16, 38-41), one count of theft of a firearm (count 17) and answered yes to all the special verdict forms related to those counts except for the trafficking in stolen property counts (and the theft of a firearm which did not include a sentencing enhancement). 9/1/15 RP 8-20; CP 818-29, 831-32, 859-864, 869-70, 872-76, 899-900. The jury returned not guilty verdicts on one count of burglary in the first degree, one count of robbery in the first degree, one count of unlawful imprisonment and one count of trafficking in stolen property in the first degree (counts 2-5). 9/1/15 RP 8-20; CP 801, 803, 805, 807. The court declared a mistrial on the remaining counts with blank verdict forms (counts 1, 6-10, 19-23, 25-32, 36-37, 42, 62-71). 9/1/15 RP 28-29; CP 797-800, 809-18, 833-58, 865-68, 877-898.

Prior to sentencing, defendant made a motion for a new trial which the court denied. SRP 3-21. Defendant made several motions regarding merger and same criminal conduct issues and the court denied all of them, but did find that the May 20, 2012, theft of a firearm and first degree burglary convictions constituted the same criminal conduct. SRP 21-33, 47-49; CP 944-961. The court sentenced defendant to a total of 564

months of confinement, which included 156 months on the robbery convictions and the high end on all the other charges which run concurrent to one another. SRP 47-49; CP 944-61. It also included 408 months of firearm sentencing enhancements. SRP 47-49; CP 944-61.

Defendant filed a timely notice of appeal. CP 1015-1033.

2. Facts

January 25, 2012, Soeung Lem Residence

On January 25, 2012, 57 year old Soeung Lem was home alone at her house at 9106 McKinley Avenue Tacoma where she lives in with her four adult children. 5RP 714-17, 757. Ms. Lem's first language is Cambodian[2] and she speaks very little English. 5RP 714-17. Around 5pm that day, she took her trash out back into an alley through her sliding glass door and noticed her dog that was upstairs started barking. 5RP 714-18, 729. When she came back in the house, someone grabbed her hand and pointed a gun at her temple. 5RP 718-20. He told her to lay down in front of the oven showing her the gun and saying "do you know what this is" first in English, then in Cambodian. 5RP 719-21. He was wearing dark clothing and a hat that covered his head, but she could see he had long hair and was short and thin. 5RP 733-34. Ms. Lem believed he was around 20 years old and that he was also Cambodian, but not born there as his accent

[2] During trial she testified with the aid of an interpreter. 4RP 713

sounded similar to the way her children spoke who had grown up in the United States. 5RP 736-37.

Ms. Lem saw that another man was searching through her drawers. 5RP 725. He was also wearing dark clothing and a hat and Ms. Lem believed he was a little taller than 5'8. 5RP 738-39. The two men spoke English to one another. 5RP 739. After a short time, the man with the gun dragged Ms. Lem to the living room telling her he was looking for gold. 5RP 722. He tied her hands with electrical wire and forced her to lay on the couch face up. 5RP 722-24. While she was being moved, Ms. Lem saw the second man come down from upstairs before a jacket was placed over her head. 5RP 723-26. She heard them opening and closing draws searching for things for about ten minutes before they removed the jacket. 5RP 726-27. They continued searching, taking jewelry and cash for the next ten minutes before telling her to stay where she was for 15 minutes and leaving through the sliding door. 5RP 727-33.

Ms. Lem waited a little while before she untied herself, shut the sliding door and called her son at work. 5RP 778. Her son did not answer so she called her sister and her daughter who then called the police. 5RP 748-49. Police officers came to the home and spoke with Ms. Lem. 5RP 749, 772. Ms. Lem and her children compiled a list of all the items that were taken from their home which included electronics, jewelry and cash. 5RP 763-65. Ms. Lem's daughter also discovered later that her passport

was missing. 5RP 768. The police took pictures of the home, the drawers, the items on the floor and the cables Ms. Lem was tied up with, all of which were shown to the jury during the trial. 5RP 744-49, 775; 10RP 1397. They were unable to find any fingerprints at the scene. 10RP 1400.

April 27, 2012, Bora Kuch Residence

On April 27, 2012, 56 year old Bora Kuch was at her home at 8208 South G Street in Tacoma where she lives there with her daughter, son in law and grandson. 6RP 789. Her first language is Cambodian, but she speaks a little English[3]. 6RP 714. Around 5:20pm that night, she was in an upstairs bedroom watching TV with her grandson when she heard a car engine and knocking at a window. 6RP 787-93. She thought it was her son in law returning home, but when she heard the noise again she went downstairs to check. 6RP 793-94. As she opened the door, two men pushed her inside and onto the floor. 6RP 794-95. One grabbed a shirt to cover his face, but Ms. Kuch noticed he was shorter and looked Cambodian like her son. 6RP 797, 801-02. He was medium build, wearing dark clothes and had black curly hair down to his neck. 6RP 802-03. She described the other man as being taller and also wearing dark clothes, but said he wore a hat and had a brown bandanna with a stripe that covered his face so only his eyes were exposed. 6RP 804-05. Ms. Kuch

[3] During the trial, Ms. Kuch testified with the aid of an interpreter. 6RP 786.

believed they both looked to be around 25 years old. 6RP 816. They searched the house and closed all the windows before tying her hands behind her back with a black rope. 6RP 797.

Ms. Kuch was able to get one hand free and when they noticed, the man with the shirt on his face said "you want to die" and pointed a handgun at her. 6RP 798. She sat back down, but was able to get free again and when she went to go see what they were doing she "saw everything turned upside down." 6RP 799. The men threatened her again asking her for a key to the safe that was in her son in law's office while tying her up again. 6RP 799. They originally spoke in a different language and when Ms. Kuch told them she did not speak that, the shorter man who looked like her son started speaking to her in Cambodian. 6RP 801-03. Ms. Kuch recognized his Cambodian as someone who was born in the United States. 6RP 803-04. Ms. Kuch told them she did not have a key and they demanded money. 6RP 800. When she said she did not have any money or the key, they threatened to take her grandson saying "If you don't have the money, I take your grandson. You don't have the money, but your children do." 6RP 800-01.

The men were eventually able to break open the safe which they took a gun from and placed in a case or bag. 6RP 817. They told her "looks great, grandma. It looks great." 6RP 817. The men searched all over the house while Ms. Kuch remained in her bedroom with her

grandson who was watching TV. 6RP 818-19. At one point, one of the men picked him up and said "are you hungry?" and "want to go see daddy?". 6RP 819.

During the incident, Ms. Kuch heard the taller man with the bandanna speaking English on a phone to another person with a female voice. 6RP 807. She also heard other voices, but the female voice was more pronounced. 6RP 811. Ms. Kuch did not understand what the woman was saying, but the taller man kept saying "almost. Almost." 6RP 808-09. Around 7pm, they told her to close her bedroom door and they left through the front door. 6RP 818.

Ms. Kuch called her daughter crying and told her what had happened and her daughter came home as the police arrived. 6RP 820, 837, 853. Ms. Kuch described the men and the gun they used to the police and told them how the men had communicated with other male and female voices during the robbery. 6RP 856-59. Ms. Kuch determined that the men had taken $500 she kept under her mattress, an 18 karat gold necklace and other jewelry. 6RP 826. In the days that followed, Ms. Kuch's daughter also discovered that "a lot" of her personal jewelry was missing to the point that she could not recall it all. 6RP 838-39. She was also storing jewelry for a friend of hers, Lehin Kim, who was on a trip to Cambodia with her husband and that jewelry was also taken during the robbery. 6RP 846-50.

Ms. Kuch's son in law, Fred Van Camp, was also storing several of Ms. Kim's husband's guns in his safe along with three of his own guns. 6RP 868-74. Although some guns were left behind, Mr. Van Camp was able to determine that a 357 Taurus revolver, a 9mm Smith and Wesson with a laser sight and a 12 gauge shotgun of his were taken. 6RP 878, 895-96. He testified that all three were functioning firearms. 6RP 879-80. Ms. Kim's husband, Sidoung Sok, determined that three of his pistols and his shotgun were taken. 6RP 886-89. He also testified that all four of his guns were functioning firearms. 6RP 890.

During the trial, the jury was shown photographs of Ms. Kuch's house and the disarray caused by the men during the break in, including a broken window. 6RP 821-26. They also viewed photographs of the safe that had been broken into. 6RP 870. Police were unable to find any fingerprints at the location. 10RP 1402-05.

May 10, 2012, Fernandez Residence

On May 10, 2012, 64 year old Remegio Fernandez and his 63 year old wife Norma were at their home at 7502 South Ainsworth Avenue in Tacoma where they live with Norma's daughter Carolyn. 7RP 906-08, 968-69. Mr. and Mrs. Fernandez are of Filipino descent. 7RP 906, 969. Around 6pm, Mr. and Mrs. Fernandez were watching television when a woman knocked on the front door asking for someone named John. 7RP

908. Mr. Fernandez described the woman as being in her late 20's, about 5 feet tall, medium chubby, believed she was of Mexican descent, and had no accent. 7RP 911-912, 998. When he told her that no John lived there, he watched her enter the passenger door of a blue four door sedan before it drove away. 7RP 912-14.

About an hour later, Mr. and Mrs. Fernandez heard a crash coming from their patio sliding glass doors and two men appeared, one holding a 9mm gun with a red laser pointed at them. 7RP 914-15, 933, 971-72, 976-77, 996. Both men were wearing black sweat pants, gloves and had their faces covered with blue bandannas except for their eyes. 7RP 928-30, 978, 996. The man with the gun was shorter, skinnier and in his late 20's with long dark curly hair. 7RP 930, 977-79, 995. At one point, the handkerchief on his face came off and Mr. Fernandez noticed he had dark skin and believed he was black or Hispanic, while Mrs. Fernandez thought he was Cambodian. 7RP 930-32, 962, 977-78. The man without the gun had a much lighter skin tone and was taller. 7RP 937-38, 980.

The men said "we want your money" and when Mr. Fernandez told them he did not have money in the house, the men pointed at Mr. Fernandez and his wife's jewelry and told them they wanted that. 7RP 916. One of the men reached for Mrs. Fernandez's necklace and Mr. Fernandez said please don't break it and offered to take it off. 7RP 916. After he gave them Mrs. Fernandez's necklace, they noticed that Mr.

Fernandez was also wearing a gold necklace and one of the men grabbed it off of Mr. Fernandez's neck. 7RP 916-17, 972.

The men continued for asking money, taking the Fernandez's between rooms searching everything including the drawers, the closets and clothes in the rooms. 7RP 918, 973. The men repeatedly told them "we know you people don't keep your money in the bank. You keep it in your house, in the pockets." 7RP 918. At one point, Mr. Fernandez tried to run, but the man with the gun caught him and began kicking and punching him as they pulled him back inside the house. 7RP 919-24. The man then put the barrel of his gun inside Mr. Fernandez's mouth and said "don't try that again". 7RP 925. He used the gun to smash the glass frames of pictures and cabinets saying "well, you made me mad". 7RP 926.

The man took Mr. Fernandez back upstairs and tied his hands and feet in front of him with cell phone charger cables from the master bedroom. 7RP 926-28, 975. He put Mr. Fernandez and his wife in the bathroom while they continued searching the house. 7RP 928, 942-43. The men eventually found some of Mr. Fernandez's daughter's money, and before they left the told Mr. Fernandez and his wife not to move because they had friends nearby who would come beat them up if they did anything. 7RP 943-44, 987. Mr. Fernandez waited about five minutes before he called 911. 7RP 944-45.

Throughout the encounter, the man with the gun showed Mr. Fernandez the gun and told him "look at this. This can kill you. Only special people can have this gun with a laser." 7RP 933. He also pulled the magazine out twice and showed Mr. Fernandez it was loaded. 6RP 934-35. The man without the gun used a two way radio to communicate with a girl who kept asking if they were done. 7RP 940-42, 984. Mr. Fernandez said the girl sounded like the girl who had come by his door earlier. 7RP 942, 997.

The police arrived shortly thereafter and took photographs of the home depicting the damage caused by the men. 7RP 946-52, 988, 991-94. Those photographs were shown to the jury during the trial. 7RP 946-52, 988. Mr. Fernandez also made a list of the items that were missing that he could remember and their approximate values. 7RP 953. It included his father's .22 caliber pistol he was pretty sure worked, a MacBook Pro laptop computer, an Xbox 360 and over $5000 cash. 7RP 953-57.

June 9, 2012, Nguyen and Vu Residence

On June 9, 2012, 76 year old Duoc Van Nguyen and 61 year old My Thanh Vu lived together in their home at 1815 South 90th street in Tacoma. 7RP 1010-11, 1037-39. They are both from Vietnam, and speak little English[4]. 7RP 1010, 1038. They consider themselves to be married

[4] During the trial, Mr. Nguyen and Ms. Vu both testified with the aid of an interpreter. 7RP 1010, 1038.

and have separate bedrooms in their home. 7RP 1012, 1039. In the middle of the night, Mr. Nguyen was awake watching television in his room when his door opened and a man holding a gun pointed it at his head and said "this is a gun that can kill." 7RP 1012-13. The man showed Mr. Nguyen it had bullets in it and Mr. Nguyen noticed the gun was a revolver between black and gray and had a purple ray coming from it. 7RP 1013-14, 1028-29. The man was wearing a scarf to cover his face, but when it fell down at one point, Mr. Nguyen noticed his skin color was a little darker than his own and that the man had dark black hair. 7RP 1021-23.

The man forced Mr. Nguyen into Ms. Vu's room where he saw a shorter darker skin toned man holding a gun at Ms. Vu. 7RP 1014-15, 1024. She had been sleeping in her bed when around 3am she was woken up by a man pointing a gun at her head. 7RP 1039. The gun had a red ray coming from it. 7RP 1042. Ms. Vu noticed he wore gloves and that they were her gloves because they had her name on them. 7RP 1039-40, 8RP 1085. She also saw he was wearing a blue bandanna to cover his face and had a cap on his head. 7RP 1041-42. When she screamed, he put his hand over her mouth. 7RP 1040. At one point, Ms. Vu saw the man's face when his bandanna dropped and she believed she had previously seen him at a grocery store. 8RP 1101-02. She later pointed the man out in a photo montage to police. 8RP 1101-02.

Both men appeared to be in their 20's and began asking for money. 7RP 1023-24, 1031. The two men ordered Mr. Nguyen and Ms. Vu into the bathroom and tied their hands with gray tape. 7RP 1015-19, 1044. The men ordered Mr. Nguyen and Ms. Vu to stay there for two hours while they searched and ransacked their home. 7RP 1015. At one point, they took Ms. Vu down to her car to unlock it so they could search the vehicle. 7RP 1020, 1045-46. While they were in the garage, one of the men took a knife of Mr. Nguyen's, similar to a meat cleaver, which he had found. 7RP 1027, 1046. Both Mr. Nguyen and Ms. Vu thought the man might use the knife to cut them, but he did not. 7RP 1027, 1047.

Mr. Nguyen and Ms. Vu noticed that throughout the encounter, the men used a cell phone to talk to a woman who was outside. 7RP 1025-27, 1047-48, 1084. Mr. Nguyen thought they spoke English and used slang saying "cut, cut, cut" and Ms. Vu said the language was really strange and thought it might be Spanish. 7RP 1025-27, 1041. After about two hours, the men told Mr. Nguyen and Ms. Vu to stay in the bathroom, wait a little bit and then they could call the police, otherwise the men would come back and shoot them, so Mr. Nguyen did that. 7RP 1029-30, 1048.

The police responded to the home around 5am and found Mr. Nguyen and Ms. Vu with duct tape around their wrists. 8RP 1074-77. They took photographs of the tape and an unlocked window in the kitchen that the men got into the house through. 7RP 1049-53; 8RP 1074-76,

1091; 11RP 1451. Mr. Nguyen described the men as Hispanic and said they had red and brown bandannas on. 8RP 1081-83. Ms. Vu made a list of everything that she believed had been stolen including jewelry and electronics and a brand new bottle of Remy Martin Cognac Hennessy. 8RP 1093-97, 1113-14.

June 17, 2012, Ha Residence

41 year old Thuy Nhi Ha was at her home at 1510 south 86th street in Tacoma with her 6 year old daughter and 3 year old son. 9RP 1203-04. She speaks Vietnamese and a little bit of English. 9RP 1202[5]. It was Father's day so Ms. Ha's parents, 59 year old Le Khuyen and 62 year old Thuy Nhi Hu had also come by the home the night before and stayed the night. 9RP 1205. Around 5 am, Ms. Ha was sleeping when she heard a noise so she got out of bed and opened her door. 9RP 1205-07. Two men with masks and guns were there and told her not to move in English. 9RP 1207-08. Ms Khuyen, who was sleeping in the room with the children had also woken up and checked to see what was going on. 9RP 1243-44. The men pulled her out of the room and woke up Mr. Hu who was in a room by himself. 9RP 1243-44. The three of them were put into a bathroom where one man stayed with them while the other man searched the entire house. 9RP 1209-10, 1244. He took the bullets out of his gun to show

[5] During the trial, Ms. Ha and Ms. Le testified with the aid of an interpreter. 9RP 1202.

them it was real. 9RP 1220-21. Ms. Khuyen was forced to give the men a gold necklace she was wearing. 9RP 1244-46.

Both men wore dark clothing and gloves and covered their faces so only their eyes were exposed. 9RP 1211-12. They spoke English to one another, but Ms. Ha believed their accents sounded like they might be Thai or Cambodian. 9RP 1217-18. The man searching the house also had a phone that he was talking to someone else on. 9RP 1213. Throughout the incident, the children stayed sleeping their rooms because Ms. Ha told the men they could take whatever they wanted, but asked them not to scare her kids. 9RP 1209-10.

When they were done searching the house, the men told Ms. Ha and her parents not to call the police or they would come back, but after Ms. Ha heard them leave she called the police. 9RP 1221-22. The police arrived and took photographs of the mess and damage that was left in the home from the men searching through everything. 9RP 1222-29. They also took photographs of a window on the back deck that was broken and presumably how the men got in. 9RP 1222-26. During the trial, the photographs were shown to the jury. 9RP 1222-28. Ms. Ha also made a list for police of all the items that were missing from her and her parents including jewelry and cash. 9RP 1229-31.

June 29, 2012, Yu and Theim Residence

On June 29, 2012, 84 year old Hing Yu and his 81 year old wife, Moo Theim were at their home at 9306 south K street in Tacoma that they share with Rany Eng and her 11 year old daughter. 8RP 1129, 1143; 9RP 1157. The three adults speak Cambodian and a little bit of English[6]. All four of them were home together when around 5pm, Ms. Eng went out to a small stove in the backyard to boil water. 9RP 1157-58. When she came back inside the house, a man pointed a gun at her and said "sit, sit, sit." 9RP 1158. There were two men inside whose faces were covered and they were wearing dark sunglasses, a hat and one had gloves. 8RP 1130, 1144-45; 9RP 1168. One of the men spoke Cambodian, but not as clear as someone who was actually from Cambodia. 8RP 1131; 9RP 1167. He had a black gun with a red light and he showed Mr. Yu the bullets saying "it's real" and held to the forehead of Ms. Eng. 8RP 1130; 9RP 1166-67. The man had another black gun in his other hand. 9RP 1167. He made all four of them sit together in the TV room and he tied Ms. Eng's hands and feet with a red rope. 9RP 1161. The other man went upstairs. 9RP 1159.

Ms. Eng tried to run out the front door, but the man pointed the gun at her saying "do you want to die" and told her to stay inside. 9RP 1182-84. The house had several security cameras inside and outside that were not on. 9RP 1178. One of the men threw one at Ms. Thiem and hit

[6] During the trial, Mr. Yu, Ms. Theim and Ms. Eng testified with the aid of an interpreter. 8RP 1116, 1142; 9RP 1155.

her in the face causing bleeding and swelling. 8RP 1144, 1146; 9RP 1180, 1183. The camera also hit Ms. Eng's 11 year old daughter. 9RP 1185. At one point, Mr. Yu tried to walk out and push the alarm for help, but the man hit him on the head with the gun and said "don't do that. Don't push on that. You want to die?". 9RP 1163-65.

After a while, the man who had originally gone upstairs came back down and was talking on a phone in English to a younger woman. 8RP 1131; 9RP 1169, 1173, 1187. He was saying that they got everything they needed. 9RP 1174. The men said something to Mr. Yu, Ms. Thiem, Ms. Eng and her daughter in English they did not understand before leaving through the front door. 9RP 1187. The police came shortly after that around 6pm in response to the alarm company calling them. 9RP 1188, 10RP 1278.

The police observed that the house was in disarray and spoke to Mr. Yu, Ms. Theim and Ms. Eng who provided a description of the suspects. 10RP 1283-86, 1290-91. Mr. Yu noticed his watch was taken, but Ms. Theim was unsure what, if anything, of hers was taken. 8RP 1148. Ms. Eng made a list of everything she believed had been taken, including $8000 of her husband's money that was in a drawer by their bed. 9RP 1192. Many of the security cameras outside the home had been pulled off the wall and smashed. 9RP 1178. Police also spoke with a neighbor who said that he noticed a light yellow sedan with Idaho license

plates with someone sitting in the driver's seat parked at the corner of the road. 9RP 1249-52. During the trial, the jury was shown photographs the police had taken of the mess left in the home and injuries sustained to everyone during the incident. 9RP 1177-82; 10RP 1282; 11RP 1457.

August 26, 2012, Danh Residence

On August 26, 2012, Hoang Danh was at his home at 631 east 51st street in Tacoma two children ages 10 and 3. 10RP 1293-95, 1364. Mr. Danh speaks Cambodian as his first language, but speaks English well[7]. 10RP 1293. His wife, Sophea Danh was at work, and Mr. Danh took the children to Home Depot to buy a new mailbox because someone had opened his mail. 10RP 1295-96, 1364. When they returned home, two men, one of whom had a knife, were hiding behind a corner and grabbed Mr. Danh who was carrying his younger son inside the house. 10RP 1297-98, 1307. His older son was waiting for his dad to return with a key to the locked glove box, but it took so long he went inside where he was also grabbed by the men. 10RP 1364-65. One was shorter and he later told Mr. Danh that he was Laotian, not Cambodian. 10RP 1302. Both men's faces were covered so only their eyes were visible and they spoke English to one another and to the Danh family. 10RP 1302-04, 1348.

[7] During the trial, Mr. and Mrs. Danh testified with the aid of an interpreter. 10RP 1293.

The men first put Mr. Danh and his sons in the family room. 10RP 1299. Then they took them upstairs and threatened Mr. Danh with the knife to get him to open a safe that was in his master bedroom. 10RP 1299, 1308, 1365. It had jewelry, money, and important documents that the men laid out on the floor. 10RP 1299. The men then forced Mr. Danh and his sons into the bathroom where they tied Mr. Danh's hands with tape. 10RP 1300, 1310, 1366.

Shortly thereafter, Mrs. Danh came home from work and one of the men ran downstairs and grabbed her. 10RP 1341. Although his face was covered, Mrs. Danh thought he looked Asian. 10RP 1345. Mr. Danh heard her screaming and the older son watched from the top of the stairs while the other man held him. 10RP 1309, 1367. Mrs. Danh tried to get away, but other man came downstairs with a knife and told her "Don't ever try to escape. Come join your family. If you continue to resist, I will kill your younger son." 10RP 1341-42. The men tied her up and put her in the bathroom with her husband and children who were all also tied up. 10RP 1309-10, 1348-49, 1369. The shorter man brought juice and milk to the 3 year old because he was crying and scared. 10RP 1301. One of them also pinky promised the older son that he was not going to hurt them and took him downstairs to get snacks. 10RP 1368.

Mrs. Danh was crying and the family was trying to comfort one another. 10RP 1349-50. Her older son told her not to cry because he did

not want the men to kill them all. 10RP 1349-50. Then the men pushed a bed to the door to the bathroom to block it. 10RP 1309-10. After a while, the family heard a door shut making them believe the men had left so they decided to push open the bathroom door. 10RP 1311-12, 1350. They called a friend who called the police and noticed the items that had been laid on the floor were gone. 10RP 1311-12.

The police arrived, spoke with the Dahns, got descriptions of the men and took photographs of the home. 10RP 1312-18, 1376-1380; 11RP 1428-29. They photographed a broken window, an open drawer of knives, Mr. Danh's mother in law's damaged bedroom door that was previously locked, the safe in his master bedroom, the tape they were tied up with and the mess throughout the house. 10RP 1315-18, 1353. The Danhs also provided a list of all the items they believed were missing from their home which included about $20,000 in cash and jewelry. 10RP 1319-22, 1351-55, 1386. Mrs. Danh had kept the money in stacks of $1000 which were each brand new $100 bills. 10RP 1354-55.

Police were able to recover fingerprints from the packing tape that was used to tie up the Dahn family. 11RP 1433. It was not a match to any of the potential suspects at the time, but the fingerprints were not analyzed to see whether they were the victim's fingerprints. 11RP 1433-35. No fingerprints matching any of the alleged suspects were ever found at the scenes of the crimes. 11RP 1446, 1455.

Investigation

As part of the investigation into these home invasion robberies, police obtained several receipts from the Gold and Silver Traders' Tacoma store and Lakewood store. 11RP 1526-28, 1537-41. It is a store which buys gold and jewelry for approximately 80% of its value and then resells it. 11RP 1550, 1525. The normal practice of the stores is to take a photograph of the jewelry they were buying and then staple that to the receipt with the information of who sold it to the store, normally a driver's license. 11RP 1541-42. Police reviewed their receipts, but found that some of them had no accompanying photograph. 11RP 1541-42. They found one receipt without a date of sale, but with a photograph of the defendant's Washington State ID card indicating he was the seller. 11RP 1548-49. The defendant's ID card had a date of issuance on it of April 24, 2012, meaning the date of sale occurred after that date. 11RP 1549.

Police also got receipts from the Puyallup and Tacoma stores of American Gold which buys precious metals and coins. 11RP 1554-55. Their practice was to make receipts which documented what the item was and photocopy the ID of the person was selling it. 11RP 1557. One of the receipts showed that on June 19, 2012, the defendant sold 10 grams of jewelry in exchange for $1035 which was about 75% of the value of the jewelry. 11RP 1558-60.

As police began investigating all these incidents as a series of home invasion robberies, an article about the robberies appeared in the local newspaper, the Tacoma News Tribune, on July 4, 2012. 11RP 1564-65, 1593-94; 15RP 2046-48. As part of a tip, officers learned that the defendant's brother, Azias Ross, was in custody at the Pierce County Jail where all non-privileged telephone calls are recorded. 11RP 1508-17, 1593-98. They began listening to his phone calls from July 4, 2012, and the days surrounding the robberies. 11RP 1593-98. They also got search warrants for the subscriber information and call records about the numbers he was having contact with. 11RP 1597. Officers also got search warrants for any cell phones that were booked into property with Azias and then search warrants for the electronic information on those phones. 11RP 1597-1600.

One phone call from May 11, 2012, the day after the robbery of the Fernandez family, was between Azias and his girlfriend, Soy Oeung, and referenced several items that were also listed as stolen by the Fernandez family. 12RP 1607-10; Exhibit 127, 127A[8]. Another call from July 4, 2012, was made by Azias to his mother where they discussed a newspaper article which discussed a robbery that had occurred the previous Friday on June 29, 2012. 13RP 1691-92; Exhibit 142, 142A. Another call on July 4, 2012, between Soy Oeung and Azias Ross also mentioned the robbery

[8] The State is filing a supplemental designation of clerk's papers to include these exhibits along with exhibits 142, 142A, 141, 141S, 130 and 130A.

in the paper and discussed the fear that Azias had about his brother facing a lengthy prison sentence if he got booked. 13RP 1696-99; Exhibit 141, 141A. A call the following day on July 5, 2012, between the defendant and Azias Ross involved Azias asking his brother to "stop doing what [he was] doing" and referencing the newspaper article and the robberies. 13RP 1699-1703; Exhibit 130, 130A.

Based on all this information, officers began looking into the defendant, his girlfriend Alicia Ngo, the defendant's brother Azias Ross, his girlfriend Soy Oeung and their friend Nolan Chouap as potential suspects. 11RP 1564-65, 1469; 14RP 2000-01; 15RP 2059-61. They created photo montages which included the defendant, Azias Ross and Nolan Chouap to show to the victims in the robberies. 15RP 2060-61. Soueng Lem identified Nolan Choaup as one of the men who robbed her saying she was 90% sure it was him. 5RP 750-51; 15RP 2061-66. She was unable to identify anyone in the montage that the defendant was in or the one that Azias Ross was in. 15RP 2066-68. Police also showed Ms. Lem and her daughter photographs of the jewelry from the receipts the day after the robbery at her home that they had obtained from the pawn shops and Ms. Lem and her daughter were able to identify some of it as theirs. 15RP 2106-2110.

Police also spoke with Ms. Bora Kuch. She attempted to identify the men from a photo montage several times and ultimately pointed to

Nolan Chouap stating that he had a similar facial feature to the shorter man who spoke Cambodian to her and she was 80% sure it was him. 6RP 828-29; 15RP 2078-82. She was unable to identify anyone in the photo montage containing the defendant or in the one containing Azias Ross. 15RP 2081-82. The police also showed Ms. Kuch and her daughter photographs of the jewelry from the receipts they obtained from the pawn shops and they were able to identify some of it as theirs. 6RP 839-40; 15RP 2083-89. The police also showed the photographs to the Kuch's friend who was storing her jewelry with them, Ms. Kim, and she was also able to identify some of the jewelry as belonging to her. 6RP 849-51; 15RP 2083-89. Detectives found a photograph on Azias Ross' cell phone which depicted numerous guns. 15RP 2089-90. It was shown to Mr. Van Camp and his friend Mr. Sok and they identified several of the guns as belonging to them. 6RP 882, 892-94; 15RP 2089-93.

Police also showed the photo montages to the Fernandez family. 15RP 2110. They were unable to make any identifications, however, police returned a second time and Mr. Fernandez identified Nolan Chouap as the man who pointed the gun at him saying he was 70% sure it was him. 7RP 958-59, 990; 15RP 2110-15. The second time, Mrs. Fernandez also identified Nolan Chouap in the montage as the man who stayed in the room with her. 7RP 958-59, 990; 15RP 2115-17. Police also met with Mr. Nguyen and Ms. Vu and showed them the photo montages. 15RP

2117-21. They were unable to make any identifications, but like the Fernandez's, police returned a second time and Ms. Vu identified Nolan Chouap. 15RP 2121-23. Police also showed the photo montages to Ms. Ha and like the others, she could not make an initial identification, but when police returned a second time she identified Nolan Chouap. 9RP 1238; 15RP 2123-29. Ms. Eng was unable to identify anyone in photo montages she was shown by police. 15RP 2145-47.

The Danhs were also shown photographs of jewelry by the police and were able to identify some of it as theirs, including some items that had their initials on them. 10RP 1322-23, 1356-57. They were also shown photo montages, and both Mr. and Mrs. Dahn separately said the photo of Nolan Chouap looked like one of the men who robbed them, but they could not be sure. 10RP 1323-24, 1357-60; 15RP 2157-62. Their son identified Nolan Chouap in a photo montage as the man who pinky swore with him during the robbery. 10RP 1372-73.; 15RP 2162-66.

Arrest

On August 27, 2012, officers were surveilling the apartment where Nolan Chouap was living off of East 76th street. 11RP 1467-72. Undercover officers followed a minivan and a Dodge Stratus that left the complex together and drove to the South Hill mall. 11RP 1467-72; 14RP 1948-52. Officers were later able to identify the defendant as the driver of

the Dodge Stratus with Azias Ross, Soy Oueng, Alicia Ngo and a small child as passengers. 14RP 1952-54. They also identified Nolan Chouap as the driver of the minivan with Michael Leair and Kasandra Zuniga as the passengers. 14RP 1953-54. The vehicles parked at the mall, and undercover as well as marked police officers detained them as the defendant started hopping away towards the Dick's Sporting Goods Store. 11RP 1476; 14RP 1955-56.

An undercover officer grabbed his police vest, identified himself as an officer and ordered the defendant to get on the ground. 11RP 1477. He saw the defendant tuck a 6 by 6 inch bag into the inside of his jacket as the defendant moved to the ground and said "I am complying". 11RP 1477-78, 1499-1500. The defendant was placed in handcuffs and during a search, in the defendant's right front pocket, the officer found a large bundle of cash with 56 new $100 bills and the defendant's ID. 11RP 1479-80; 15RP 2179. The officer found the bag which contained watches and gold jewelry. 11RP 1480. The Dahn family later identified several of those items as theirs. 15RP 2181-85.

The defendant, Nolan Choap, Azias Ross, Soy Oeung and Alicia Ngo were all arrested and transported to the police station for interviews. 15RP 2166. Officers found Azias Ross had 51 new $100 bills on him, Alicia Ngo had 72 new $100 bills on her and business cards for several pawnshops, 15RP 2167-70. Officers also searched the minivan and inside

Ms. Zuniga's purse they found 24 newer not wrinkled $100 bills. 14RP 195-62.

During the interview of the defendant, he admitted to being one of the two people who robbed the Kuch residence on April 27th, the Fernandez residence on May 10th, the Nguyen and Vu residence on June 9th, the Yu and Thiem residence on June 29th and the Danh residence on August 26th. 16RP 2218-19.

Police executed a search warrant at the defendant's home he shared with his brother, his parents and Soy Oeung. 12RP 1632. Underneath a staircase in suitcases, they found a .357 firearm, over a hundred rounds of ammunition for various firearms, a magazine clip for a .22 caliber rifle, gun holster, two bandannas, two black gloves, a black head scarf, a balaclava[9] and a receipt for a .38 special purchased at Dick's Sporting Goods on June 23, 2012. 13RP 1719-24. In Azias Ross and Soy Oeung's room they found a rifle, a .45 calibur handgun magazine, a pistol magazine and a bottle of Hennessey later identified by Mr. Nguyen as the one taken from his home. 8RP 1114; 14RP 1890-95; 16RP 2370-73. In a china hutch on the main floor, they found a loaded .38 caliber silver Smith and Wesson revolver, a pair of black gloves and an item called "A Safe Crackers Manual". 14RP 1899-1901, 1906-12. The Smith and Wesson was later tested by the police and found to be operable. 14RP 1944-45.

[9] The officer testified a balaclava is a hoodie with an opening for the nose and the mouth which is typically worn over the head. 13RP 1723-24.

As part of the takedown, officers also got a search warrant to search the apartment they had been surveilling at 915 75th street east in Tacoma where Nolan Chouap lived. 13RP 1705; 14RP 1984-85. In one of the bedrooms they found numerous credit cards belonging to Hoang Danh and Sophea Kuoch. 13RP 1705-09. They also found a box containing 46 rounds of 9mm bullets. 13RP 1709. Inside a bedroom that had Nolan Chouap's Washington State ID, officers found an Xbox whose serial number matched the one taken from Mr. Fernandez's house. 14RP 1930-37; CP 446-463[10].

Trial

During the trial, Kasandra Zuniga, Nolan Chouap's ex-girlfriend, testified that Azias Ross and Nolan Chouap were best friends. 14RP 1965-70. She said that the day of the arrest, the money that officers found in her purse was Nolan's that he told her to take because they were going to go shopping that day at the mall. 14RP 1976-79. Ms. Zuniga also testified that she had twice been with Nolan and another man to sell jewelry at pawnshops. 14RP 1979-81. She also acknowledged that she had seen Nolan with handguns. 14RP 1982.

[10] The exhibit record identifies Exhibit 134 as being a copy of Nolan Chouap's Washington State Identification Card.

The defendant's mother also testified during the trial that the defendant was with her at his sister's graduation in Spokane from May 9th to the 16th. 19RP 2545-51. His father also testified that the day defendant was arrested, he had $5000 in $100 bills from selling a car that morning, and that defendant had a drug problem where he often sold jewelry for pills. 19RP 2594-2600. He also testified that the handgun, rifle and shotgun found in the house were his. 20RP 2639-41.

The defendant also chose to testify during the trial and discussed his addiction to Percocet, including how he sold them and would often receive jewelry and electronics as a form of payment. 20RP 2691-2704. He stated that in 2012 he was selling gold and jewelry for his friends who did not have IDs. 20RP 2707. He also testified that the money he had on him when he was arrested was from selling a Tahoe earlier that day and the jewelry was from a friend who wanted him to sell it for him. 20RP 2725-29, 2736-38. Defendant said that he had taken Percocet pills before his interview with police and he only admitted to the robberies because he felt forced to agree with the things the police were telling him he had done. 20RP 2744-56.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S CrR 3.5 MOTION TO SUPPRESS HIS STATEMENTS TO LAW ENFORCEMENT.

a. Substantial evidence in the record supports the trial court's finding that the defendant knowingly, voluntarily and intelligently waived his rights.

Under both the federal and state constitutions a defendant possesses rights against self-incrimination and *Miranda* warnings protect these rights in custodial interrogation situations. U.S. Const. amend. V.; Wash. Const. art. I § 9; ***Miranda v. Arizona***, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Washington's Supreme Court has adopted CrR 3.5 as the procedural vehicle for testing the constitutionality of admitting a defendant's statements to law enforcement at trial. ***State v. McFarland***, 15 Wn. App. 220, 222, 548 P.2d 569 (1976). In a CrR 3.5 hearing "[t]he burden is upon the State to show [a] [knowing] intelligent and voluntary waiver by a preponderance of the evidence." ***State v. Woods***, 34 Wn. App. 750, 759, 665 P.2d 895 (1983) (*citing* ***State v. Coles***, 28 Wn. App. 563, 567, 625 P.2d 713 (1981); ***State v. Braun***, 82 Wn.2d 157, 163, 509 P.2d (1973)). A waiver may be in writing or oral. ***State v. Rupe***, 101 Wn.2d 664, 678, 683 P.2d 571 (1984).

The trial court must review the totality of the circumstances to determine whether the State met its burden. ***State v. Athan***, 160 Wn.2d

354, 380, 158 P.3d 27 (2007). This includes looking at the setting in which the statements were obtained, the details of the interrogation, and the background, experience, and conduct of the accused. ***State v. Robtoy***, 98 Wn.2d 30, 36, 652 P.2d 284 (1982) *abrograted on other grounds by* ***State v. Radcliffe***, 164 Wn.2d 900, 194 P.3d 250 (2008).

A trial court's finding of voluntariness is binding on appeal where the record contains substantial evidence supporting that conclusion. ***State v. Ng***, 110 Wn.2d 32, 37-38, 750 P.2d 632 (1988). "Substantial evidence" is evidence that is sufficient to persuade a fair-minded person. ***State v. Cyrus***, 66 Wn. App. 502, 506 n. 4, 832 P.2d 142 (1992), *review denied*, 120 Wn.2d 1031 (1993). Unchallenged findings are verities on appeal and legal conclusions are reviewed de novo. ***State v. Broadway***, 133 Wn.2d 118, 131, 942 P.2d 363 (1997); ***State v. Mendez***, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). Credibility determinations are for the trier of fact and not subject to appellate review. ***State v. Thomas***, 150 Wn.2d 821, 875, 83 P.3d 970 (2004).

Defendant in the present case contends that the trial court erred in denying his motion to suppress his statements. He argues that the trial court's finding that his waiver was knowingly, voluntarily and intelligently made was not supported by evidence in the record and to the contrary, the evidence suggested it was in fact not knowing, intelligent and voluntary. Opening Brief of Appellant at 33-37. Both of these are

incorrect. A review of the record shows that the trial court's ruling was supported by substantial evidence and there was no evidence in the record to support defendant's claim that his waiver was not knowing, intelligent or voluntary.

During the hearing, the trial court heard testimony from the two detectives who spoke to the defendant the night he was arrested. 8/19/13 RP 6-100. They testified they had no difficulty communicating with the defendant, he spoke English and he never indicated he could not read English. 8/13/19 RP 95-96. They testified that they read defendant his *Miranda* rights from the form, he stated he understood his rights and he initialed next to the question on the form indicating that he understood his rights. 8/19/13 RP 18, 83. A copy of that form was submitted for the court to review. 8/19/13 RP 18-19.

The detectives also testified that the defendant agreed to an interview that lasted approximately two hours and never asked for an attorney or for the officers to stop questioning him. 8/13/19 RP 19. They testified that there was nothing defendant exhibited in regard to his mental state that caused them any concern, and he was able to track their questions and answer in rational ways. 8/19/13 RP 51-52. All of this evidence supports the trial court's finding that the defendant's waiver was made knowingly, intelligently and voluntarily.

Contrary to the defendant's assertion, there was no evidence in the record to support his claim that his waiver was not knowing, voluntary or intelligent because he was high on drugs. Defendant did not testify during the CrR 3.5 hearing and the evidence he relies upon to support his claim comes from his testimony during the trial which was not part of the record or before the court at the time it made its ruling on this issue. There was no actual evidence presented to support his claim, only insinuations from counsel counsel's questions.

The evidence that was actually presented reflected that the detectives had no concern about defendant being under the influence of anything at the time. Detective Griffith testified that although he believed there may have been some pills found in the room, there was never any indication that the defendant was high or on drugs. 8/13/19 RP 36-37. Detective Thompson testified that he did not recall any discussion about Percocets with the defendant. 8/13/19 RP 88, 98. Both detectives testified that the defendant did not appear groggy or tired during the interview. 8/13/19 RP 56, 89. The trial court recognized there was no evidence to support defendant's claim that he did not knowingly, voluntarily or intelligently waive his rights and properly denied defendant's motion to suppress. CP 205-222.

Indeed, even if there had been some indication that defendant may have been under the influence at the time, that in and of itself would not

render the waiver involuntary. "Intoxication alone does not, as a matter of law, render a defendant's custodial statements involuntary and thus inadmissible." ***State v. Turner***, 31 Wn. App. 843, 845-46, 644 P.2d 1224, *review denied*, 97 Wn.2d 1029 (1982). Intoxication renders a statement involuntary only if it rises to the level of mania. ***State v. Cuzzetto***, 76 Wn.2d. 378, 383, 457 P.2d 204 (1969). In this context, "mania" means that the defendant was unable to comprehend what he was doing and saying. *Id.*, at 386. For example, in ***State v. Turner***, the court found defendant's confession was admissible, notwithstanding defendant's claim that he was undergoing a heroin withdrawal when questioned, where the (1) defendant was repeatedly advised of his *Miranda* rights; (2) he indicated he wanted to waive them; (3) he appeared rational at all times; and (4) the jail physician saw no necessity for medical treatment. 31 Wn. App. at 846.

In the present case there was nothing to even suggest defendant was under the influence of anything, let alone so unable to comprehend what he was doing or saying so as to render his waiver involuntary. The trial court properly denied defendant's motion to suppress his statements as there was substantial evidence in the record to support its finding that his waiver was knowing, voluntary and intelligent.

b. Even if the admission of his statements was error, any error was harmless in light of the overwhelming evidence indicating his guilt.

Admission of statements obtained in violations of Miranda is subject to a harmless error analysis. ***State v. Reuben***, 62 Wn. App. 620, 626, 814 P.2d 1177 (1991). In analyzing harmless error, the Washington Supreme Court adopted the "overwhelming untainted evidence" standard where the court looks "only at the untainted evidence to determine if it is so overwhelming it necessarily leads to a finding of guilty." *Id.* at 627 (*citing* ***State v. Guloy***, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985)). In this case, the evidence and testimony presented during the trial overwhelmingly showed that defendant committed the crimes he was convicted of. Even if the defendant's statements were erroneously admitted, any error was harmless.

2. THE STATE HAS TAKEN ACTION TO REMEDY THE ERROR OF FAILING TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW.

CrR 3.5(c) requires that after a CrR 3.5 hearing has been held, the trial court must state in writing: "(1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusions as to whether the statement is admissible and the reasons therefor." The trial court in the present case made a lengthy oral ruling on the record, but initially failed to enter written findings of fact and conclusions of law. CP

205-222. The appropriate remedy in such a situation is to remand for entry of written findings and conclusions on the suppression hearing. *See* ***State v. Head***, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998).

However, "findings and conclusions may be submitted and entered even when an appeal is pending" and some case law suggests the State should take the necessary steps to remedy the situation when it is first made aware of the issue. ***State v. McGary***, 37 Wn. App. 856, 861, 683 P.2d 1125, *review denied*, 102 Wn.2d 1024 (1984); ***State v. Smith***, 68 Wn. App. 201, 208, 842 P.2d 494 (1992)(State's delay in entering findings, especially after opening brief of defendant was filed which pointed out the deficiency, was deemed to be prejudicial); ***State v. Cunningham***, 116 Wn. App. 219, 226, 65 P.3d 325 (2003)(no error where trial court's oral record was sufficient to permit review and written findings were promptly filed once the State was notified of the error). The late entry of findings of fact and conclusions of law does not constitute error as long as the defendant is not prejudiced and the State does not tailor the findings to meet the issues raised by the appellant in his opening brief. ***State v. Pray***, 96 Wn. App. 25, 30-31, 980 P.2d 240 (1999).

Once the State was made aware of the fact that written findings of fact and conclusions of law were not filed in the present case, the State alerted the deputy prosecuting attorney (DPA) who conducted the CrR 3.5

hearing to the issue[11]. The State directed the DPA to communicate with defendant's trial attorney to resolve the issue and alerted defendant's appellate attorney that this was occurring. The written findings of fact and conclusions of law were filed on January 31, 2017. CP 1051-1054[12]. Any error related to this issue has thus been resolved.

3. THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION TO DISMISS AS DEFENDANT IS UNABLE TO SHOW THAT THE INFORMATION WAS FACTUALLY INSUFFICIENT OR THAT HE WAS PREJUDICED BY SUCH A DEFICIENCY NECESSARY TO WARRANT DISMISSAL WITHOUT PREJUDICE UNDER THE ***KJORSVIK*** TEST.[13]

The federal and Washington constitutions require that a defendant be informed of the criminal charge he or she is facing at trial and cannot be tried for an offense which has not been charged. U.S. Const. amend. VI; Wash. Const. art. I § 22; ***State v. Vangerpen***, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). This means that all essential elements of a crime, statutory or otherwise, must be included in the charging document for the information to be considered constitutionally adequate. ***State v. Kjorsvik***, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991). The charging document must

[11] The State's attorney during the CrR 3.5 hearing was different than the State's attorney during trial.
[12] The State is filing a supplemental designation of clerk's papers requesting that the written findings of fact and conclusions of law be made part of the record.
[13] This argument section responds to defendant's assignments of error 4-6. Defendant broke this issue into two argument sections, 3 and 4, but the State will respond to both in this single section. *See* Opening Brief of Appellant, at 40-48.

also allege facts supporting every element of the offense. ***State v. Nonog***, 145 Wn. App. 802, 806, 187 P.3d 335 (2008); *see also* CrR 2.1[14]. The purpose is to notify the accused of the nature of the allegations against them so they may properly prepare a defense. ***Nonog***, 145 Wn. App. at 806 (*citing* ***State v. Leach***, 113 Wn.2d 679, 688, 782 P.2d 552 (1989)).

There are two standards of review for evaluating the sufficiency of a charging document. The first, the liberal standard, gives courts "considerable leeway to imply the necessary allegations from the language of the charging document." ***State v. Kjorsvik***, 117 Wn.2d 93, 104, 812 P.2d 86 (1991). The second, the strict standard, constitutes a "bright line rule mandating dismissal" if the charging document omits an essential element of the crime. ***State v. Johnson***, 119 Wn.2d 143, 150, 829 P.2d 1078 (1992). Which standard is applicable is determined by the timing of the motion challenging the sufficiency. ***State v. Borrero***, 147 Wn.2d 353, 360, 58 P.3d 245 (2002).

a. <u>This Court reviews challenges to charging documents after the State rests but before the jury reaches a verdict using the liberal standard of review.</u>

The Washington Supreme Court has never expressly considered what standard of review applies when a defendant challenges a charging

[14] CrR 2.1(a)(1) requires the information to state "a plain, concise and definite written statement of the essential facts constituting the offense charged."

document after the State rests, but before the jury reaches a verdict, as is the present situation. ***State v. Sullivan***, 196 Wn. App. 314, 321, 382 P.3d 736 (2016). They have implicitly held that the strict standard applies, but in those cases, the shifting standard was not essential to the outcome of the cases. ***State v. Phillips***, 98 Wn. App. 936, 942, 991 P.2d 1195 (2000); *See, e.g.*, ***State v. Johnson***, 119 Wn.2d, 143, 150, 829 P.2d 1078 (1992) (challenge raised before trial making strict construction standard appropriate because State could move to amend the information); ***State v. Vangerpen***, 125 Wn.2d 782, 788, 888 P.2d 1177 (1995) (challenge raised after both sides had rested and no dispute as to the sufficiency of the information under either standard, thus, determining the appropriate standard to apply was unnecessary to decide the case).

In light of this, there has been a split amongst the divisions of the Court of Appeals as to which standard is appropriate in the present situation. Division One has adopted the strict standard reasoning that the State has the ability to refile the complete charge and believing that the liberal standard in this situation was "implicitly rejected by the Supreme Court in ***State v. Vangerpen***." ***State v. Chaten***, 84 Wn. App. 85, 87, 925 P.2d 631 (1996). By contrast, this Division and Division Three have reached the opposite conclusion finding that the liberal standard is appropriate in this situation. *See* ***State v. Phillips***, 98 Wn. App. 936, 942-43, 991 P.2d 1195 (2000); *see also* ***State v. Sullivan***, 196 Wn. App. 314,

322, 382 P.3d 736 (2016). Several years ago in ***State v. Kiliona-Garramone***, 166 Wn. App. 16, 24, 267 P.3d 426 (2011), *review denied*, 174 Wn.2d 1014 (2012), this Division reaffirmed its decision to apply the liberal standard to situations like the present one. As a result, this Court should review the information in the present case under the liberal standard of review set forth in ***Kjorsvik*** and construe the information in favor of its validity.

a. Defendant is unable to satisfy either prong of the ***Kjorsvik*** test.

Under the liberal standard of review, the trial court must decide "whether (1) the necessary facts appear in any form, or by fair construction are found, in the charging document; and if so, (2) whether the defendant can show that he or she was nonetheless actually prejudiced by the inartful or vague language that he alleges cause a lack of notice. ***Phillips***, 98 Wn. App. at 942-43 (*citing* ***State v. Kjorsvik***, 117 Wn. 2d 93, 105-106, 812 P.2d 86 (1991)). The first prong of the test focuses on the face of the charging document whereas the second prong, the prejudice prong, may look beyond the face of the charging document. ***Kiliona-Garramone***, 166 Wn. App. at 24-25 (*citing* ***Kjorsvik***, 117 Wn.2d at 106).

As stated above, the "essential elements" rule requires that a charging document allege facts supporting every element of the offense in addition to adequately identifying the crime charged. ***State v. Leach***, 113 Wn.2d 679, 689, 782 P.2d 552 (1989). The purpose is to apprise the

defendant of the charges against him or her and to allow them to present a defense. ***State v. Goodman***, 150 Wn.2d 774, 784, 83 P.3d 410 (2004) (*citing* ***State v. Vangerpen***, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995)). "It is sufficient to charge in the language of a statute if it defines the offense with certainty." ***State v. Elliott***, 114 Wn.2d 6, 13, 785 P.2d 440 (1990)(citing ***Leach***, 113 Wn.2d at 686). When determining whether the necessary facts are actually alleged in any given charging document, the analysis focuses on the language of the charging document from the perspective of a person of common understanding. ***State v. Valdobinos***, 122 Wn.2d 270, 286, 858 P.2d 199 (1993); *see* RCW 10.37.052.

Defendant first argues that the information relating to counts 12 and 34, the first degree burglary counts, was factually insufficient because it did not identify the location of the residences where the burglaries occurred. Opening Brief of Appellant at 46. While ownership or occupancy may be necessary to prove that an entry into a building is unlawful, it is not an essential element of burglary. *See* ***State v. Klein***, 195 Wn. 338, 343-44, 80 P.2d 825 (1938) (recognizing that ownership is not an essential element of burglary and that an allegation of ownership is material only for two purposes: "(1) To show on the record that the building burglarized is not the property of the accused, and (2) to identify the offense to such an extent as to protect the accused from a second prosecution for the same offense."); *See also* ***State v. Knizek***, 192 Wash.

351, 355, 73 P.2d 731 (1937) (ownership of burglarized building is not essential element of the offense). The language in counts 12 and 34 of the second amended information described how the defendant "did unlawfully and feloniously, with intent to commit a crime against a person or property therein, enter or remain unlawfully in a building" CP 294-317. This language makes it clear that he was charged with a crime because he did not have a right to enter the building.

The other counts detailing the other crimes said to have occurred on the same day, May 10, 2012, also provide defendant with additional details of that incident. Counts 13 and 14 detail robberies committed against R. Fernandez and N. Fernandez, and count 17 discusses the theft of a firearm during the incident. CP 294-317. The same is true with the June 29, 2012 incident. Counts 35, 36 and 37 detail the robberies committed against R. Eng, H. Yu, T. Moo, and count 42 details an assault with a deadly weapon perpetrated against A.C. during the incident. CP 294-317. This information provided defendant with enough information to identify the burglaries with which he was charged in counts 12 and 34 and contained sufficient factual specificity to understand the charges against him and present a defense. Defendant is unable to meet the first prong of the ***Kjorsvik*** test in regards to counts 12 and 34.

Defendant also argues that counts 13, 14 and 35 which charged first degree robbery also failed to identify the specific conduct the

defendant was charged with having committed. Opening Brief of Appellant at 46. However, all three of those counts contained the essential elements of the crime and as described above, detailed the individual whom they were committed against. Other counts from the same incident date also provided additional information to apprise defendant of the conduct of the crime. "It is sufficient to charge in the language of a statute if it defines the offense with certainty" and such is what occurred with respect to these counts. ***State v. Elliott***, 114 Wn.2d 6, 13, 785 P.2d 440 (1990)(*citing* ***Leach***, 113 Wn.2d at 686). Defendant is unable to meet the first prong of the ***Kjorsvik*** test in regards to counts 13, 14 and 35.

Defendant also argues that counts 15, 16, 38, 39, 40 and 41, all charging unlawful imprisonment, were also deficient in that they failed to specify the name of the victim. Opening Brief of Appellant at 47. But, again as described above, looking at the other counts charged on the same day provides much of this information on its own. Additionally, while it does not appear that any Washington court has addressed the issue, it seems unlikely a court would hold that the name of the victim was an essential element of the crime of unlawful imprisonment. *See* ***State v. Ward***, 148 Wn.2d 803, 811, 64 P.3d 640 (2003) ("An essential element is one whose specification is necessary to establish the very illegality of the behavior charged."); *Cf.* ***State v. Plano***, 67 Wn. App. 674, 679-80, 838 P.2d 1145 (1992) (the name of the alleged victim is not an essential

element of the crime of assault in the fourth degree). As such, because unlawful imprisonment counts charged in the information contained all of the essential elements of the crime, and the surrounding counts contained information which helped specify the factual conduct the defendant was charged with committing, defendant is also unable to meet the first prong of the ***Kjorsvik*** test in regards to these counts.

Even if this Court were to find he had met the first prong of the ***Kjorsvik*** test with respect to any of the counts, defendant is unable to meet the second prong and show he was nonetheless actually prejudiced by the inartful or vague language. The original information filed on August 30, 2012, included the addresses that were left out of the second amended information in counts 12 and 34. CP 91-117. Count 16 of the original information details the address of the burglary on May 10, 2012, and count 26 details the address of the burglary on June 29, 2012. CP 91-117. As such, defendant was given notice three years before the trial of the addresses of those incidents and is unable to show he was prejudiced by a lack of notice in the second amended information.

Most importantly however, before the defendant put on his case, the State made an oral offering of a bill of particulars as to those specific counts defendant alleged during the trial were factually insufficient and alleges again in this appeal. 18RP 2453-59. If an information states each statutory element of a crime, but is vague regarding some other matter, a

bill of particulars is capable of correcting the defect. ***State v. Holt***, 104 Wn.2d 315, 320, 704 P.2d 1189 (1985). In the present case, the State went through each count and specified the addresses and names of the victims of the relevant counts. 18RP 2453-59. Defendant was therefore aware of all the details he claims the information was factually insufficient on before he presented a defense. He is unable to meet the second prong of the ***Kjorsvik*** test and show he was prejudiced by the vague language in the information when the State made a record and provided him with that information.

For all of these same reasons, the trial court did not err when it denied defendant's motion to dismiss for a constitutionally deficient information. The trial court appropriately recognized that the essential elements were all contained within the information and any issue regarding factual specificity of the conduct could have and was cured by the bill of particulars orally made by the State. 18RP 2448-61. As described above, defendant has failed to show that the information was constitutionally deficient and therefore the trial court did not err in denying the defendant's motion to dismiss on that basis.

It should be noted however, that in the event this Court were to find the information was constitutionally inadequate and reverse defendant's convictions on the basis of an insufficient charging document, the proper remedy is to dismiss the charges without prejudice and allow

the State the right to recharge and retry the defendant for the offenses. ***State v. Vangerpen***, 125 Wn.2d 782, 794-95, 888 P.2d 1177 (1995).

4. DEFENDANT IS UNABLE TO SHOW PROSECUTORIAL MISCONDUCT OCCURRED IN THE PRESENT CASE THAT HAD A SUBSTANTIAL LIKELIHOOD OF AFFECTING THE JURY'S VERDICT.

To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. ***State v. Manthie***, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (*citing* ***State v. Weekly***, 41 Wn.2d 727, 252 P.2d 246 (1952)). The defendant has the burden of establishing that the alleged misconduct is both improper and prejudicial. ***State v. Stenson***, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). "If the defendant objected at trial, the defendant must show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict." ***State v. Emery***, 174 Wn.2d 741, 760, 278 P.3d 653 (2012).

When reviewing an argument that has been challenged as improper, the court should review the context of the whole argument, the issues in the case, the evidence addressed in the argument and the instructions given to the jury. ***State v. Russell***, 125 Wn.2d 24, 85-6, 882 P.2d 747 (1994), (*citing* ***State v. Graham***, 59 Wn. App. 418, 428, 798 P.2d 314 (1990)). In closing arguments, attorneys have latitude to argue the

facts in evidence and any reasonable inferences therefrom. ***State v. Smith***, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985). However, they may not make statements that are unsupported by the evidence or invite jurors to decide a case based on emotional appeals to their passion or prejudices. ***State v. Jones***, 71 Wn. App. 798, 808, P.2d 85 (1993).

Defendant in the present case argues that the prosecutor committed misconduct during closing argument by appealing to the passion and prejudices of the jury. Opening Brief of Appellant at 48-53. Specifically, he references comments made during the following exchange:

> [PROSECUTOR]: These crimes were horrible. These victims – and these are just some of them – these victims all believed, as everyone does, that their home is a place of sanctuary, a place of safety, a place of joy, a place where you raise your families. Everyone understands that if you go out into the community, you might, if you are in the wrong place at the wrong time, succumb to violence. No one should believe, as these victims now do –
>
> [DEFENSE ATTORNEY]: Your Honor, I am going to object to this type of argument on the lines of Claflin and the recent Division II cases as an improper basis for urging a conviction.
>
> THE COURT: I will sustain as to what the victims felt.
>
> [DEFENSE ATTORNEY]: And move to strike.
>
> THE COURT: Stricken.
>
> [PROSECUTOR]: No one should believe that their homes are not safe. No one should believe that their homes might be the wrong place –

[DEFENSE ATTORNEY]: I am going to object to this basically as an attempt to get in that testimony or that argument as improper.

THE COURT: Overruled.

[PROSECUTOR]: for these victims, they suffered horrendous crimes. The idea that you could be at home watching TV or having dinner or asleep in your bed and men like the defendant and Nolan Chouap wearing masks and guns would come barreling into your homes? It's unimaginable that these victims would be threatened with their lives, threatened with their safety. It's horrible.

[DEFENSE ATTORNEY]: Your Honor, I am going to object to this under the Claflin line of cases. I think the State's burden is to prove it beyond a reasonable doubt and not to emote.

THE COURT: Overruled.

[PROSECUTOR]: That these victims, imagine these victims were told, "If you don't give us what we want, we will kidnap your grandkids. If you don't stop fighting with us, we will kill your son." It's horrible. And it is for these actions, not once or twice or three times or four times or five times or six times, seven different times, these actions, families went through this. And for this, justice demands accountability, and the accountability will come through in your verdict forms.

[DEFENSE ATTORNEY]: Your Honor, I object to this argument as urging a conviction on an improper ground. The State's –

THE COURT: Sustained –

[DEFENSE ATTORNEY]: Thank you.

THE COURT: as to form.

21RP 2825-27. During that exchange, two of defense counsel's objections were sustained and defense counsel did not request a limiting instruction at any point. The court had previously instructed the jury to disregard any questioning or evidence that the court ruled inadmissible. 4RP 588; 21RP 2812; CP 464-557 (Instruction No. 1). Therefore, any issue with regard to the statements which involved sustained objections was cured by the court's action in sustaining the objections. As a result, this Court is reviewing the comments made by the prosecutor where the objection was overruled. Those statements consist of the following remarks by the prosecutor:

> No one should believe that their homes are not safe. No one should believe that their homes might be the wrong place [objection – overruled] for these victims, they suffered horrendous crimes. The idea that you could be at home watching TV or having dinner or asleep in your bed and men like the defendant and Nolan Chouap wearing masks and guns would come barreling into your homes? It's unimaginable that these victims would be threatened with their lives, threatened with their safety. It's horrible.

21RP 2825-26.

While a prosecutor must not appeal to the passion and prejudice of a jury, references to the heinous nature of the crime and its effect on the victim can be a proper argument. ***State v. Claflin***, 38 Wn. App. 847, 849-50, 690 P.2d 1186 (1984), *review denied*, 103 Wn.2d 1014 (1985) (*citing* ***State v. Fleetwood***, 75 Wn.2d 80, 84, 448 P.2d 502 (1968) and ***State v.***

Buttry, 199 Wn. 228, 251, 90 P.2d 1026 (1939)). The fact that a defendant's conduct is likely to arouse strong emotions from the jury does not mean that a prosecutor must refrain from commenting on the evidence as presented at trial. ***State v. Fleetwood***, 75 Wn.2d 80, 84, 448 P.2d 502 (1968).

The prosecutor's statements described what evidence was presented during the trial. While it may arouse strong emotions because of the nature of the crimes, it was evidence that was properly before the jury and not something the State should be required to downplay. These were incredibly horrendous crimes directly targeted at and perpetrated against many vulnerable people and children. The prosecutor is allowed to discuss what happened to those people and how they felt during that experience.

What makes comments such as this improper is when they are overly inflammatory or repeated in a way where their only use is to appeal to the passion and prejudice of a jury such that they cause prejudice which has a substantial likelihood of affecting the jury's verdict. Not only were the comments in the present case not overtly inflammatory or referencing matters outside of the evidence, they were miniscule in the context of the entire closing argument. The prosecutor's comments came at the very

beginning of a closing argument that lasted approximately an hour and ten minutes. CP 558-593[15].

In addition, the court instructed the jury orally in both the opening and closing instructions as well as in writing in the jury instructions that the lawyers' remarks, statements and arguments were not evidence or the law. 4RP 587; 21RP 2812; CP 464-557 (Instruction No. 1). The court also instructed the jury that they were not to let their emotions overcome their rational thought process and that they must reach their decision based on the facts and the law, not on sympathy, prejudice or personal preference. 4RP 595; 21RP 2812; CP 464-557 (Instruction No. 1). The jury is presumed to follow the court's instructions. ***State v. Warren***, 165 Wn.2d 17, 28, 195 P.3d 940 (2008), *cert. denied*, -- U.S. --, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009). The fact that the court also sustained two of the prosecutor's comments and specifically one "as to what the victims felt" reiterated to the jury that any consideration of what the victim's felt was not something they were to consider in their evaluation of the case.

Defendant argued that this was a case of misidentification in his closing and is something this Court should consider in evaluating any prejudicial impact the State's comments had on the jury. 21RP 2886,

[15] The clerk's minutes from August 24, 2015, indicate that the State began its closing argument at 1:19 pm, there was a hearing outside the jury from 1:27 pm to 1:32 pm and the State finished it's closing at 2:37 pm.

2896. Defense counsel acknowledged the emotional nature of these crimes in her closing when she stated:

> This is a sad case. It's a terrible thing, you are right. And we concede and acknowledge that all of those people whose pictures the State has shown you were burglarized. They were tied up. They were robbed. All of these things happened, and they shouldn't have happened, and they have our sympathy. But Azariah didn't do them. He didn't do them.

21RP 2930-31. By not challenging that the crimes had occurred or that the victims were put through terrible experiences, she did not challenge the emotional nature of the crimes. Instead, by arguing that it was a case of misidentification, she shifted the focus from the jury back to the facts and evidence that was before them. Any claimed appeal to the passion and prejudice of the jury was effectively diminished by defense counsel's acknowledgment of the crimes and defense strategy to challenge the identification of the perpetrator of those crimes.

Finally, the jury acquitted defendant of four counts and hung on 32 counts in this case after deliberating for five days. CP 797-801, 809-817, 833-858, 865-868, 877-898; 8/31/15 RP 10; 9/1/15 RP 8-20. These numerous acquittals and undecided verdicts substantially weaken the defendant's argument that the jury was so swayed by the State's comments that they felt it necessary to convict the defendant based on their passion and prejudice rather than the evidence that was presented. The acquittals actually suggest that the jury carefully and fairly considered

the evidence that was presented to them and made their decision based on the evidence, not an overwhelming emotional response to the prosecutor's argument. For all of these reasons, even if this Court were to find the prosecutor's statements were improper, defendant is unable to show they had a substantial likelihood of affecting the jury's verdicts.

5. DEFENDANT IS UNABLE TO SHOW A DOUBLE JEOPARDY VIOLATION WHERE THE LEGISLATURE HAS AUTHORIZED MULTIPLE PUNISHMENTS FOR HIS CRIMES HE CLAIMS MERGE.

The double jeopardy clause guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. The double jeopardy clause applies to the states through the due process clause of the Fourteenth Amendment, and is coextensive with article I, § 9 of the Washington State Constitution. ***State v. Gocken***, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995) (*citing* ***Benton v. Maryland***, 395 U.S. 784, 794, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969)). Washington's double jeopardy clause offers the same scope of protection as the federal double jeopardy clause. ***State v. Adel***, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998) (*citing* ***Gocken***, 127 Wn.2d at 107). The double jeopardy clause encompasses three separate constitutional protections:

> It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same crime.

Gocken, 127 Wn.2d at 100.

Appellate courts "review questions of law such as merger and double jeopardy de novo." ***State v. Zumwalt***, 119 Wn. App. 126, 129, 82 P.3d 672 (2003), *aff'd sub nom.* ***State v. Freeman***, 153 Wn.2d 765, 108 P.3d 753 (2005). When addressing a double jeopardy challenge, the court first considers whether the legislature intended cumulative punishments for the challenged crimes. ***State v. Freeman***, 153 Wn.2d 765, 771, 108 P.3d 753 (2005). Legislative intent can be explicit as in the antimerger statute where it provides that burglary may be punished separately from any related crime. ***Freeman***, 153 Wn.2d at 772-73; RCW 9A.52.050. However, there can also be sufficient evidence of legislative intent that the court is confident that the legislature intended to separately punish two offenses arising out of the same bad act. ***Freeman***, 153 Wn.2d at 772 (*citing* ***State v. Calle***, 125 Wn.2d 769, 777-78, 888 P.2d 155 (1995) (rape and incest are separate offenses)).

If the legislative intent is not clear, then the court will turn to the test from ***Blockburger v. United States***, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932) to determine if double jeopardy has been offended by defendant's multiple convictions. ***Freeman***, 153 Wn.2d at 772. Under the ***Blockburger*** test the court examines each crime to determine if one crime contains an element that the other does not. *Id.* This analysis is not done on an abstract level, but "[w]here the same act or transaction

constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." ***Freeman***, 153 Wn.2d at 772 (*quoting* ***Blockburger***, 284 U.S. at 304). However, the ***Blockburger*** presumption may be rebutted by other evidence of legislative intent.

Finally, merger is a doctrine of statutory interpretation used to determine whether the legislature intended to impose multiple punishments for a single act that violates several statutory provisions. ***State v. Vladovic***, 99 Wn.2d 413, 419 n2, 662 P.2d 853 (1983). "The [merger] doctrine arises only when a defendant has been found guilty of multiple charges, and the court then asks if the Legislature intended only one punishment for the multiple convictions." ***State v. Michielli***, 132 Wn.2d 229, 238-239, 937 P.2d 587 (1997). With respect to cumulative sentences imposed in a single trial, the double jeopardy clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended. ***Missouri v. Hunter***, 459 U. S. 359, 366, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1982).

The merger doctrine can be used to determine legislative intent even when two crimes have different elements. Under the merger doctrine, when the degree of one offense is raised by conduct separately criminalized by the legislature, the court will presume the legislature

intended to punish both offenses through a greater sentence for the greater crime. ***Freeman***, 153 Wn.2d at 772-73 (*citing* ***Vladovic***, 99 Wn.2d at 419). However, the court may separately punish two crimes that otherwise appear that they should merge if there is an independent purpose or effect to each. ***Freeman***, 153 Wn.2d at 773 (*citing* ***State v. Frohs***, 83 Wn. App. 803 807, 924 P.2d 384 (1996), *see also* ***Vladovic***, 99 Wn.2d at 421-22).

a. The legislature has authorized multiple punishments for unlawful imprisonment and burglary convictions through the burglary anti-merger statute.

Defendant was convicted of one count of burglary in the first degree and two counts of unlawful imprisonment for the May 10, 2012 incident and one count of burglary in the first degree and four counts of unlawful imprisonment for the June 29, 2012. CP 820, 826, 828, 861, 869, 871, 873, 875, 944-961; 9/1/15 RP 10-12, 15-18. He argues that the unlawful imprisonment convictions should merge with his first degree burglary convictions. Opening Brief of Appellant at 56.

Defendant's argument is contrary to the legislature's explicitly stated intent in the "burglary antimerger" statute RCW 9A.52.050 which reads "Every person who, in the commission of a burglary shall commit any other crime, may be punished therefor as well as for the burglary, and may be prosecuted for each crime separately." The plain language of that statute shows that the legislature intended that crimes committed during a

burglary do not merge when the defendant is convicted of both. ***State v. Sweet,*** 138 Wn.2d 466, 478, 980 P.2d 1223 (1999); *See also* ***State v. Hoyt,*** 29 Wn. App. 372, 378, 628 P.2d 515, *review denied*, 95 Wn.2d 1032 (1981) ("the anti-merger statute is an express statement that the legislature intended to punish separately any other crime committed during the course of a burglary."). This applies even where they encompass the same criminal conduct. ***State v. Kisor***, 68 Wn. App. 610, 618-19, 844 P.2d 1038, *review denied*, 121 Wn.2d 1023, 854 P.2d 1084 (1993). As a result, defendant is unable to show a double jeopardy violation as the legislature has expressed their clear intent that crimes for first degree burglary do not merge with any other crimes committed with it.[16]

b. The merger doctrine is not applicable to the crimes of unlawful imprisonment and first degree robbery.

Defendant was also convicted of two counts of robbery in the first degree for the May 10, 2012 incident, and one count of robbery in the first degree for the June 29, 2012. CP 822, 824, 863, 944-961; 9/1/15 RP 10-12, 15-18. Like above, he argues that the unlawful imprisonment convictions from those dates should merge with the robbery in the first

[16] Defendant made an argument below that the trial court should exercise the discretion that RCW 9A.52.050 gives her and find that those crimes merge. On appeal, defendant does not assign error to the trial court's decision to not merge the two crimes, he only assigns error in the form of a double jeopardy violation for the two crimes. *See* Appellant's Assignment of Error 11, Issues Pertaining to Assignments of Error 10, pages 53-60 of the Opening Brief of Appellant. Therefore, the State will not address the issue in the context of whether the trial court abused its discretion in not merging the crimes.

degree convictions. Opening Brief of Appellant at 56. But, the merger doctrine applies *only*:

> where the Legislature has clearly indicated that in order to prove a particular degree of crime (e.g., first degree rape) the State must prove not only that a defendant committed that crime (e.g., rape) but that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes (e.g., assault or kidnapping).

State v. Vladovic, 99 Wn.2d 413, 421, 662 P.2d 853 (1983).

To convict defendant of robbery, the State had to prove, among other things, an intent to commit theft and the taking of personal property from the person or in the presence of another by the use or threatened use of immediate force, violence or fear of injury. RCW 9A.56.190; RCW 9A.56.200. To prove those actions constituted robbery in the first degree, the State had to prove that in the commission of that robbery or immediate flight therefrom, the defendant was armed with a deadly weapon, displayed what appeared to be a firearm or deadly weapon or inflicted bodily injury. RCW 9A.56.200(1)(a). A person commits the crime of unlawful imprisonment when one knowingly restrains another person. RCW 9A.40.040(1).

In viewing the relevant statutes, it is apparent that robbery in the first degree does not require proof of unlawful imprisonment and therefore, the merger doctrine is not applicable. This is also supported by the Supreme Court's declaration that "the law is now settled that just as

kidnapping can never merge into robbery, neither can robbery merge into kidnapping." ***State v. Berg***, 181 Wn.2d 857, 866, 337 P.3d 310 (2014). In Washington, unlawful imprisonment is a lesser included offense of kidnapping. ***State v. Hansen***, 46 Wn. App. 292, 296, 730 P.2d 706 (1986). Therefore, it suggests that unlawful imprisonment will likewise never merge with kidnapping.

Defendant's argument referencing the analysis in ***State v. Korum***, 120 Wn. App. 686, 86 P.3d 166 (2004), *affirmed in part and reversed in part*, 157 Wn.2d 614, 141 P.3d 13 (2007), and discussing how the restraint was incidental to the robbery, conflates the "separate and distinct" injury exception to the merger doctrine with the merger doctrine itself. *See* ***State v. Frohs***, 83 Wn. App. 803, 815–16, 924 P.2d 384 (1996). Under that exception, an offense that has a separate and distinct injury or purpose may be punished separately even if proof of that offense would otherwise elevate the degree to another felony. ***Frohs***, 83 Wn. App. at 807, 924 P.2d 384 (*citing* ***State v. Johnson***, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979)). But the exception does not support the converse proposition:

> Where the merger doctrine itself does not apply because proof of another crime (e.g., assault) is not necessary to raise the degree of the additional crime (e.g., unlawful restraint), the fact that a defendant may have used physical force, even the same physical force, to accomplish the unlawful restraint does not mean the merger doctrine is applicable. This is because the Legislature has not – by the enactment of degrees of the crime, each higher degree

> having stiffer penalties – already taken the "included" crime into account in setting the penalty. Thus, the courts are not precluded from imposing separate penalties for each conviction.

Frohs, 83 Wn. App. at 816, 924 P.2d 384; *see also* ***State v. Calle***, 125 Wn.2d 769, 782, 888 P.2d 155 (1995) (convictions for first degree incest and second degree rape arising from single act of sexual intercourse did not violate double jeopardy).

This is analogous to the case of ***In re Personal Restraint of Fletcher***, 113 Wn.2d 42, 776 P.2d 114 (1989), where the Supreme Court rejected the suggestion that an "incidental" offense merged into robbery. In ***Fletcher***, the defendant pleaded guilty to first degree assault, first degree robbery, and first degree kidnapping after the codefendant forced his way into a car occupied by two women and then drove the women to a secluded area. Acknowledging that the robbery and kidnapping occurred simultaneously when the codefendant forced himself into the women's car and that the kidnapping was "incidental" to the robbery and did not have an independent purpose, the Court rejected the defendant's claim that the kidnapping merged into the robbery: "Proof of kidnapping is not necessary to prove robbery and the kidnapping conviction did not merge into the robbery conviction." ***Fletcher***, 113 Wn.2d at 52. Again, because unlawful imprisonment is a lesser included offense of kidnapping,

Fletcher supports the proposition that defendant in the present cases unlawful imprisonment convictions did not merge, even if they could be considered "incidental" to the robberies.

Defendant's analysis distorts the merger doctrine. He is unable to show a double jeopardy violation as the merger doctrine clearly does not apply to the crimes in the present case of first degree robbery and unlawful imprisonment.

6. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT THE FIRST DEGREE ROBBERY AND UNLAWFUL IMPRISONMENT CONVICTIONS DID NOT CONSTITUTE THE SAME CRIMINAL CONDUCT WHEN THEY WERE COMMITTED AGAINST DIFFERENT VICTIMS AND WITHOUT SAME INTENT.

At sentencing, a defendant's current offenses must be counted separately in calculating his or her offender score unless the trial court enters a finding that they "encompass the same criminal conduct." RCW 9.94A.589(1)(a). "[S]ame criminal conduct" means "two or more crimes that [1] require the same criminal intent, [2] are committed at the same time and place, and [3] involve the same victim." RCW 9.94A.589(1)(a); ***State v. Walker***, 143 Wn. App. 880, 890, 181 P.3d 31 (2008); ***State v. Tili***, 139 Wn.2d 107, 985 P.2d 365 (1999). The Legislature intended the phrase "same criminal conduct" to be construed narrowly. ***State v. Saunders***, 120 Wn. App. 800, 824, 86 P.3d 232 (2004); ***State v. Flake***, 76 Wn. App. 174, 180, 883 P.2d 341 (1994), and the absence of any one of these criteria

prevents a finding of same criminal conduct. ***Walker***, 143 Wn. App. at 890; ***State v. Haddock***, 141 Wn.2d 103, 110, 3 P.3d 733 (2000); ***State v. Vike***, 125 Wn.2d 407, 410, 885 P.2d 824 (1994).

"Intent in this context means the defendant's objective criminal purpose in committing the crime." ***Walker***, 143 Wn. App. at 891. To determine whether two or more criminal offenses involve the same criminal intent, the Washington Supreme Court established the objective criminal intent test, which requires a court to focus on "the extent to which a defendant's criminal intent, as objectively viewed, changed from one crime to the next." ***State v. Dunaway***, 109 Wn.2d 207, 214-15, 743 P.2d 1237 (1987); ***State v. Lessley***, 118 Wn.2d 773, 777-778, 827 P.2d 996 (1992). The Court also "consider[s] whether one crime furthered the other." ***State v. Grantham***, 84 Wn. App. 854, 858, 932 P.2d 657 (1997). This Court has held that "evidence of a gap in time between" two or more crimes together with "the activities and communications that took place during that gap in time, and the different methods of committing the [crimes]" can be "sufficient to support a finding that the crimes did not occur at the same time and that [the defendant] formed a new criminal intent when he committed the second [or subsequent crime]." ***State v. Grantham***, 84 Wn. App. 854, 859, 932 P.2d 657 (1997).

At sentencing, "it is the defendant who must establish the crimes constitute the same criminal conduct." ***State v. Graciano***, 176 Wn.2d 531,

539, 295 P.3d 219 (2013). On review, "determinations of same criminal conduct are reviewed for abuse of discretion or misapplication of law." ***State v. Graciano***, 176 Wn.2d 531,535-38, 295 P.3d 219 (2013); ***State v. Maxfield***, 125 Wn.2d 378, 402, 866 P.2d 123 (1994) ("[t]he trial court's determination whether two offenses require the same criminal intent is reviewed by this court for abuse of discretion or misapplication of the law").

a. May 10, 2012 crimes

Out of the May 10, 2012 incident, defendant was convicted of two counts of robbery in the first degree and two counts of unlawful imprisonment in the first degree. CP 822-829, 944-961; 9/1/15 RP 11-12. Defendant argues that the trial court abused its discretion in finding that these convictions did not constitute the same criminal conduct. Opening Brief of Appellant at 60-64. The State does not dispute that the relevant crimes involved the same victims, with count 13 for first degree robbery, and count 15 for unlawful imprisonment relating to Mr. Fernandez, and count 14 for first degree robbery, and count 16 for unlawful imprisonment relating to Mrs. Fernandez. CP 294-317; 18RP 2455. For sake of argument, even if they occurred at the same time and place, it is apparent that they did not constitute the same criminal conduct as they did not involve the same intent.

This Court recently addressed this exact issue in the unpublished co-defendant's case of ***State v. Oeung***, 196 Wn. App. 1011 (2016 WL

7217270).[17] Oeung was similarly convicted of two counts of first degree robbery and two counts of unlawful imprisonment against the same victims arising out of the same incident on May 10, 2012. ***Oeung***, 196 Wn. App. 1011 (2016 WL 7217270 at 1-9). She argued, like defendant in the present case, that the crimes constituted the same criminal conduct. ***Oeung***, 196 Wn. App. 1011 (2016 WL 7217270 at 28). This Court compared the facts in this incident to ***State v. Louis***, where the defendant bound, gagged and locked victims in a closet to facilitate his robbery of a jewelry store. 155 Wn.2d 563, 566-67, 120 P.3d 936 (2005). In ***Louis***, the Supreme Court held that "Louis's robbery and kidnapping charges were not the same factually: 'The robbery necessitated the intentional taking of jewelry at gunpoint, while the kidnapping charge was based on Louis's binding and gagging the victims with duct tape to facilitate the commission of the robbery.' " *Id.* at 570 (*quoting* ***State v. Louis***, 119 Wn. App. 1080, 2004 WL 79150 (2004)). Like in ***Louis***, this Court then held that "Remegio and Norma's restraint and confinement in the bathroom demonstrates a different criminal intent, an intent to materially restrain the Fernandez's liberty, than that of taking property of threat or force." ***Oeung***, 196 Wn. App. 1011 (2016 WL 7217270 at 29). As a result, this Court held that Oeung had failed to show the trial court abused its discretion when it

[17] GR 14.1 allows for citations to unpublished opinions filed on or after March 1, 2013. This decision has no precedential value, is not binding on any court, and is cited only for such persuasive value as this Court deems appropriate.

determined that the crimes of unlawful imprisonment and first degree robbery were not the same criminal conduct. ***Oeung***, 196 Wn. App. 1011 (2016 WL 7217270 at 29).

That issue is identical to the present case. As in Oeung's case, the Fernandez's testified during the defendant's trial that two men with a gun entered their home and demanded money while forcing them to take off their jewelry. 7RP 915-18, 972-73. At one point, Mr. Fernandez tried to run and after the men caught him, they took him and his wife upstairs to the bathroom. 7RP 919-21, 974-75. The men tied Mr. Fernandez's hands and feet with a phone charger so he could not move and ordered them to remain there. 7RP 919-921, 974-75. Just as this Court found in Oeung's case, by tying the Fernandez's up in the bathroom, the defendant exhibited a different criminal intent than in his actions of taking their property by threat or force. As a result, the trial court did not abuse its discretion in finding that the unlawful imprisonment and first degree robbery convictions from this incident were not the same criminal conduct.

b. June 29, 2012 crimes

Out of the June 29, 2012 incident, defendant was convicted of one count of robbery in the first degree and four counts of unlawful imprisonment in the first degree. CP 863, 869-76; 9/1/15 RP 16-18. Defendant again argues that the trial court abused its discretion in finding that these convictions did not constitute the same criminal conduct.

Opening Brief of Appellant at 60-64. However, many of the crimes did not involve the same victim and therefore did not constitute the same criminal conduct. *See* RCW 9.94A.589(1)(a). Count 35, robbery in the first degree, related to Rany Eng, count 38, unlawful imprisonment related to Rany Eng, count 39, unlawful imprisonment related to Hing Yu, count 40, unlawful imprisonment related to Thiem Moo and count 41, unlawful imprisonment related to Abby Chui. CP 294-317; 18RP 2457. In other words, the only counts that involved the same victim were count 35 and count 38 as they both related to Rany Eng.

Again, for sake of argument, even if those two crimes were considered to have occurred at the same time and place, like above the evidence shows that the defendant's intent changed during the course of the incident. While the initial force or fear was used to take property, Ms. Eng testified that at one point she left the room they were forcing her to sit in and she tried to escape through the front door and call for help. 9RP 1182-84. She said that one of the men stopped her by pointing the gun at her and saying "do you want to die" so she returned inside. 9RP 1182-84. The objective intent at that point was no longer to obtain property by Ms. Eng through the use of force or fear, it was to restrain her and prevent her from leaving the home and getting help. As a result, the trial court properly found the unlawful imprisonment and first degree robbery against Ms. Eng did not encompass the same criminal conduct.

Even if this court were to find that the crimes against Ms. Eng constituted the same criminal conduct, any error is harmless as it relates to defendant's offender score and sentencing range. Given the number of convictions, the calculation of defendant's offender score for both the unlawful imprisonment in count 38 and the first degree robbery in count 35 would remain at a nine plus. Therefore, defendant's standard range would remain the same for both crimes and any error in the failure to count these crimes as the same criminal conduct is harmless.

7. THIS COURT SHOULD DISREGARD ANY ISSUES PERTAINING TO DEFENDANT'S ASSIGNMENTS OF ERROR 8 AND 9 AS DEFENDANT HAS FAILED TO PROVIDE ANY ARGUMENT ON THOSE ISSUES IN HIS BRIEF.

RAP 10.3(a)(6) requires the appellant to provide "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." Assignments of error that are stated, but not argued in the brief are deemed waived and will not be considered on appeal. ***State v. Boggs***, 80 Wn.2d 427, 423, 495 P.2d 321 (1972); ***State v. Ozanne***, 75 Wn.2d 546, 551, 452 P.2d 745 (1969); *See also* ***San Juan County v. Hage***, 54 Wn.2d 419, 421, 341 P.2d 872 (1959) (assignment of error will be disregarded where appellant's brief on appeal contains no argument in support thereof), ***State v. Williams***, 96 Wn.2d 215, 226, 634 P.2d 868 (1981) (where no argument is

made on an issue, the court must conclude it has been abandoned).

In the present case, defendant's assignments of error include:

> 8. Insufficient evidence supports the conviction for theft of a firearm because the State failed to prove the alleged firearm was operable.
>
> 9. The trial court erred in denying the appellant's motion to dismiss the conviction [for] theft of a firearm due to insufficient evidence.

Opening Brief of Appellant at 1-2. Although he sets forth the issue regarding these assignments of error, defendant fails to make any argument concerning this issue. *See* Opening Brief of Appellant at 4, 32-63. Therefore, this Court should not consider this issue on appeal as defendant has failed to provide any argument in support of the claimed error.

D. CONCLUSION.

For the foregoing reasons, the State would respectfully request this Court affirm defendant's convictions and sentence.

DATED: March 21, 2017.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

CHELSEY MILLER
Deputy Prosecuting Attorney
WSB # 42892

Certificate of Service:
The undersigned certifies that on this day she delivered by US mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

3.21.17 Theresa Kal
Date Signature

PIERCE COUNTY PROSECUTOR
March 21, 2017 - 2:03 PM
Transmittal Letter

Document Uploaded: 2-483211-Respondent's Brief.pdf

Case Name: State v. Ross

Court of Appeals Case Number: 48321-1

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ___

Answer/Reply to Motion: ___

■ Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ___
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Therese M Kahn - Email: tnichol@co.pierce.wa.us

A copy of this document has been emailed to the following addresses:

ptiller@tillerlaw.com